No. 83-770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE CITY OF NEW YORK and THE STATE OF NEW YORK,

Appellants,

—against—

THE UNITED STATES DEPARTMENT OF TRANSPORTATION and THE MATERIALS TRANSPORTATION BUREAU OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the National Environmental Policy Act, 42 U.S.C. §§4331-4347, and the Hazardous Materials Transportation Act, 49 U.S.C. §§1801-1812, require that an Environmental Impact Statement be prepared prior to promulgation of a regulation by the United States Department of Transportation which allows the shipment of spent-fuel from nuclear reactors and other large-quantity shipments of radioactive materials through high-density urban areas, to consider the low probability, but catastrophic consequence risks attendant to shipment of such materials through urban areas, and to consider alternative modes of transporting such materials, including barging.

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STATEMENT

Appellants City of New York and State of New York appeal* from a judgment of the United States

*Parties to the appeal not mentioned in the caption include appellees Commonwealth Edison Company, Consolidated Edison Company of New York, Georgia

(footnote cont'd on next page)

Court of Appeals for the Second Circuit, dated August 10, 1983, which reversed, with one judge dissenting, a judgment of the District Court for the Southern District of New York, (SOFAER, J.) entered May 6, 1982. The Court of Appeals remanded with instructions to enter a judgment upholding a regulation of the United States Department of Transportation ("DOT"), referred to by DOT as "HM-164", which relates to the transportation of radioactive materials by highway. The District Court had found that HM-164 was arbitrary, capricious, and an abuse of discretion to

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*(footnote cont'd from previous page)

Power Company, Long Island Lighting Company, Northeast Utilities, Northern States Power Company, Pacific Gas and Electric Company, Power Authority of the State of New York, Public Service Electric and Gas Company, Southern California Edison Company, and Yankee Atomic Electric Company. These utility companies intervened as defendants below and took positions adverse to those of appellants. Appellees Town of Brookhaven and Sullivan County, political subdivisions of the State of New York, intervened below and supported the positions of appellants to this Court, but did not submit briefs to the Court of Appeals and have not filed Notices of Appeal to this Court.

the extent it overrides non-federal bans on truck transportation of spent fuel and other large-quantity radioactive materials through densely populated areas such as New York City. The Court held that the National Environmental Policy Act, ("NEPA"), 42 U.S.C., §§4321-4347, had been violated in that DOT failed to make a rational finding of no significant environmental impact, or to consider the appropriate alternatives to such shipments of radioactive materials. The District Court also held that the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C., §§1801-1812, mandates that DOT avoid, where reasonably possible, all significant risks not inherent in the transport of radioactive materials. Upon finding that these statutory requirements had not been complied with by DOT, and that the City of New York had shown that it was subject to a credible risk of high consequence accident, and had proposed an alternative to highway transport, i.e., barging, so that such alternative should have been considered by DOT, the District Court enjoined application of HM-

164 as to New York City. The Court did not extend its injunction to other jurisdictions, holding that the record was insufficient to enable the Court to determine where application of HM-164 should also be banned, but ordered that DOT receive applications from jurisdictions who might also show that HM-164 is invalid as to them.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (SOFAER, J.), which appears in the Appendix at page 57a, is reported sub. nom. City of New York v. United States Dept. of Transp. at 539 F. Supp. 1237.

The opinion of the United States Court of Appeals for the Second Circuit, which appears in the Appendix at page 1a, is reported under the same title, at 715 F. 2d 732.

JURISDICTION

Alleging that HM-164 violated both HMTA and NEPA, the appellant City of New York sought a declaratory judgment and injunctive relief pursuant to 5 U.S.C. §702, 28 U.S.C. §§1331, 2201, 2202, and

Rule 57 of the Federal Rules of Civil Procedure.

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 10, 1983. A notice of appeal to this Court on behalf of the City of New York was filed in the Court of Appeals on August 19, 1983. A notice of appeal on behalf of the State of New York was filed on August 31, 1983.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(2). The Court of Appeals held that the regulation HM-164 properly preempts a provision of the New York City Health Code (§175.111[1]). App., p. 40a. Here there has been preemption by federal "laws". Tully v. Mobil Oil Corp., 455 U.S. 245, 246, n.1 (1982); Malone v. White Motor Co., 435 U.S. 497, 499 (1978). The provision of the New York City Health Code found to be preempted, adopted by resolution of the Board of Health of the City of New York, is a "State statute" for purposes of 28 U.S.C. §1254(2). City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922, 927, n.2

(1975); Chicago v. Atchison, T. & S. F.R. Co., 357 U.S. 77 (1958); Grossman v. Baumgartner, 17 NY 2d 345, 350-351 (1966); cf., United States v. Howard, 352 U.S. 212 (1957).

RELEVANT STATUTE

The text of the amendment to the New York City Health Code, §175.111(1), preempted by DOT's Rule HM-164, is set out at pages 195a-197a of the Appendix.

STATEMENT OF THE CASE

Proceedings Below

(1)

This action was commenced in the United States District Court for the Southern District of New York by the City of New York seeking judicial review of the validity of HM-164, a regulation promulgated by DOT setting forth routing rules for the highway transportation of radioactive materials. 46 Fed. Reg. 5298 (Jan. 19, 1981) (codified at 49 C.F.R. §§171-173, 177 [1982]). HM-164 would preempt section 175.111(1) of the New York City Health Code, which severely restricts the transport

of non-military radioactive materials through New York City and thus requires that spent fuel produced on Long Island be shipped across Long Island Sound by barge. App., pp. 195a-197a. The City requested in its complaint a declaration that HM-164 is in violation of HMTA and NEPA in that it authorizes highway transportation of large quantities of radioactive materials although DOT had not considered alternate modes of transport posing less of a risk to public safety and had failed to adequately assess the potential consequences of dispersion of radioactive materials to the public in densely populated urban areas. The City initially brought the action against DOT and its Materials Transportation Bureau. Thereafter, the State of New York, the Town of Brookhaven and Sullivan County intervened as plaintiffs, and the Commonwealth Edison Company and other utility companies were permitted to intervene as defendants. The federal defendants moved for summary judgment, and the plaintiffs City and State cross-moved for summary judgment.

The District Court, in a judgment entered May 6, 1982, granted the City and State's motion to the extent of declaring that HM-164 is arbitrary, capricious and an abuse of discretion and in violation of both NEPA and HMTA to the extent that the regulations would preempt state or local bans on highway transportation of spent nuclear fuel and other large quantity shipments of radioactive materials through New York City and other densely populated areas, without undertaking and making reviewable findings concerning the risks posed and the potential consequences of incidents involving the transport of such materials; without complying with the mandate of HMTA to avoid where reasonably possible all significant risks not inherent in the transport of such materials; and without examination of the availability of non-highway modes of transport. App., pp. 53a-55a. The District Court enjoined the defendants from enforcing HM-164 so as to override the New York City Health Code's ban on transportation of spent fuel and other large quantity shipments of radioactive materials

until they had complied with HMTA and NEPA, and further enjoined enforcement overriding any other existing or future state or local ban on such highway transportation through densely populated areas, once such state or locality can show, on application to DOT, that such overriding would result in shipment through areas in the range of population for which DOT's analysis of high consequence accidents is inadequate and that an alternative to road transport exists that appears to be feasible and potentially safer than road transport. App., pp. 55a-56a.

In its opinion, the District Court found that, with respect to the shipment of spent fuel and other large-quantity radioactive materials, DOT, in promulgating HM-164, had failed to comply with the requirements of NEPA. The Court found that DOT's conclusion that HM-164 would have no significant environmental impact was arbitrary and capricious. App., p. 142a. The Court held that DOT's discussion of the probability of a catastrophic accident, described by DOT as "credible", was inadequate in

that it was based on incorrect factual assumptions and unreliable data, and that DOT failed to take into account the potential effect of human error or to consider the possibility of sabotage or terrorism. App., pp. 119a-132a. DOT's evaluation of the consequences of such an accident in an urban area was found to be inadequate in that it failed to resolve inconsistencies in the data underlying its Environmental Assessment or to consider the public concerns about the consequences of an accident arising out of the shipment of such radioactive materials. App., pp. 132a-138a. The Court further found that DOT was required to consider the "credible" risk of disaster in an urban area as an independent basis for a finding of significant environmental impact, but rather had merely concluded that the overall risk of such disaster, i.e., probability times consequence, was low. App., pp. 138a-142a. Finally with respect to NEPA, the Court concluded that, whether or not an EIS should have been prepared, DOT was required to consider alternatives to highway shipment; DOT, however,

failed to consider reasonable alternatives which were before it and which were potentially safer than highway shipments, including, in the instance of New York City, the barging of such materials. App., pp. 142a-170a.

The District Court held that under HMTA, DOT had the substantive duty to adopt reasonable measures to maximize safety in hazardous materials transportation, and thus was required to consider alternatives to highway transport through urban areas, and to adopt a safer option unless it is impractical or would impair some other national policy. Thus DOT's decision to force highway shipments on unwilling localities, absent a showing that the materials could not be stored where generated, and without considering non-highway modes of transportation, such as barging, violated HMTA. App., pp. 170a-183a. The Court also held that 49 U.S.C., §1811(b), providing for non-preemption rulings by the Secretary of DOT under certain circumstances, did not relieve DOT of its obligation to maximize safety in its regulation of

radioactive transportation. App., pp. 93a-94a, 179a.

(2)

Upon the appeals of DOT and the defendants-intervenors to the Court of Appeals for the Second Circuit, that Court, with one judge dissenting, reversed and upheld the validity of HM-164. App., pp. 3a-4a. The Court of Appeals first addressed the substantive requirements of HMTA, and held that Congress did not intend that DOT be required to maximize public safety, on a jurisdiction by jurisdiction basis, and did not require that DOT compare modes of transportation to determine the safest mode. Rather, DOT was free to regulate each mode of transportation on an individual basis. The Court of Appeals found HM-164 rationally related to the policy of developing acceptable modes of public safety for a particular mode of transportation, in this case highway transportation, and that there was no statutory violation. App., pp. 11a-16a.

The Court of Appeals then addressed the District Court's findings that DOT violated NEPA.

Since DOT was not required by HMTA to compare modes of transportation, it was acting within its statutory mandate in limiting its inquiry to highway transportation, and in not considering barging, which the Court held is not an alternative to DOT's objective of creating national safety regulations for highway transportation. App., pp. 16a-21a. Barging around New York City could be considered on the City's application for a non-preemption ruling pursuant to 49 U.S.C. §1811(b), and need not be considered in an Environmental Assessment. App., pp. 22a-23a. DOT did not violate NEPA in deciding that an EIS was not required, but rather had taken the requisite "hard look" at the environmental consequences. App., pp. 23a-30a. The Court of Appeals held that DOT had not acted arbitrarily in failing to discuss differences in expert projections of future shipment levels, that the risk of human error was too insignificant to be specifically considered, and that DOT could determine that sabotage added nothing to the risk of high-consequence accidents. App., pp. 30a-36a. The

Court of Appeals found DOT's consideration of the potential physical consequences of an accident to be supported by the record. App., pp. 36a-37a. Finally, the Court of Appeals held that the courts may not fault DOT for its use of an overall risk analysis, or for finding that a remote possibility of a catastrophic accident did not create a "significant" risk for the human environment. App., pp. 38a-39a.

(3)

Judge Oakes, in dissent, stated that DOT's own regulations required it to prepare an EIS, given the "unique [and] unknown risks" associated with and the "highly controversial" nature of nuclear waste transport. App., p. 45a. He also stated that HM-164 was invalid in that DOT relied on insufficient or contradictory data at several crucial points, i.e., shipment volume analysis, accidents data and packaging response data, and that the possible effect of both human error and sabotage should have been considered in an EIS. App., pp. 45a-52a. The finding of no significant effect upon the environment from HM-164 was arbitrary and

capricious, and the effect of a "worst-case" accident alone was sufficient to require an EIS. App., pp. 41a, 52a. In light of DOT's failure to consider alternative modes of transport or local storage, the Court's approval of HM-164 effectively negates NEPA. App., p. 52a.

THE QUESTION IS SUBSTANTIAL

THE PROMULGATION OF A REGULATION BY THE UNITED STATES DEPARTMENT OF TRANSPORTATION ALLOWING THE SHIPMENT OF LARGE-QUANTITY RADIOACTIVE MATERIALS THROUGH DENSELY POPULATED AREAS WITHOUT PREPARING AN ENVIRONMENTAL IMPACT STATEMENT CONSIDERING APPARENTLY SAFER MODES OF TRANSPORTATION IS A VIOLATION OF NEPA AND HMTA.

Congress, in passing NEPA, sought to ensure that administrative decisionmaking affecting the environment is informed by full and thoughtful evaluation of the potential environmental impact of proposed federal actions. Stryker's Bay Neighborhood Council v. Karles, 444 U.S. 223, 227 (1980). Accordingly, NEPA requires that an EIS be prepared whenever there is a proposal

"for legislation and other major Federal actions significantly affecting the quality of the human environment...". 42 U.S.C. §4332(c). The agency must take a "hard look" at the environmental consequences of the proposed action. Kleppe v. Sierra Club, 427 U.S. 390, 410, n.21 (1976). Furthermore, pursuant to NEPA, Congress established the Council on Environmental Quality (CEQ), which was given the duty, inter alia, to review the programs and activities of the Federal government to determine the extent such programs and activities contribute to the policy of NEPA. 42 U.S.C. §§4342, 4344(3). CEQ's regulations state that in determining whether an action "significantly" affects the environment, the agency is to consider, among other things, the degree to which "the effects on the quality of human environment are likely to be highly controversial," and "the possible effects on the human environment are highly uncertain or involve unique or unknown risks" and must also consider "[w]hether the action threatens a violation of Federal, State or local law or

requirements imposed for the protection of the environment." 40 C.F.R. §1508.27(b)(4),(5),(10). CEQ's regulations are entitled to "substantial deference" (Andrus v. Sierra Club, 442 U.S. 347, 358 [1979]), but in any event they have been adopted by the Department of Transportation as binding upon it. DOT Order 5610.1C, p. 2 (Sept. 18, 1979), App., p. 201a.

Despite the above legal requirements, DOT determined that its promulgation of HM-164 did not have a significant impact upon the environment,and did not prepare an EIS, although it found the risk of catastrophe to be "credible." App., p. 117a; 46 Fed. Reg. at 5299 (Jan. 19, 1981). Thus DOT took the unusual action of refusing to prepare an EIS on a project that could result in a deadly and calamitous nuclear accident within a crowded, urban area. The question whether such refusal is arbitrary and capricious, and contrary to law, is a substantial issue meriting review by this Court.

There can be no doubt that the effect of HM-164 on the human environment is likely to be "highly

controversial". As pointed out by Judge Oakes, a project is controversial if "a substantial dispute exists as to the size, nature, or effect of the major federal action." Foundation for North American Wild Sheep v. United States Department of Agriculture, 681 F. 2d 1172, 1182 (9th Cir. 1982) (emphasis in original). Nor can it be gainsaid that the "possible effects on the human environment are highly uncertain or involve unique or unknown risks." Here, there are significant disagreements over the consequences of a severe transport accident in a densely populated area, with differing estimates of mortality ranging up to over a million fatalities. App., pp.133a-135a. There was also significant controversy as to the probability that a disastrous accident might occur, with substantial claims that DOT relied on insufficient or incorrect data, inter alia, as to the number of truck shipments expected to traverse New York City in 1985 and into the future, the number of accidents which have occurred in the past, and the strength of the casks to be used in shipping radioactive material

App., pp. 119a-125a. The very uncertainty of determining such risks and probabilities underscores the need for a EIS fully discussing such questions. Finally, the very purpose of HM-164 was to override "State or local law[s] or requirements imposed for the protection of the environment". 40 CFR §1508.27(b)(10). See App., pp. 63a-67a, 140a-141a; 46 Fed. Reg. at 5299-5300 (Jan. 19, 1981).

Even apart from the requirements of the CEQ guidelines, as Justice Oakes noted, the determination that there will be no significant effect upon the environment from HM-164 was arbitrary and capricious because DOT relied on insufficient or contradictory data at crucial points and failed to address certain risks. These include, as mentioned above, a failure to resolve a significant dispute as to the number of future shipments of radioactive materials, reliance upon accident data (accident reports to DOT) conceded by DOT to be unreliable, and a failure to discuss studies indicating that the casks to be used for shipping material would be far less safe than DOT assumed. App., pp.

45a-50a. Furthermore, DOT failed to consider explicitly the effect of human error on its probability assessments or to weigh the effect of the risk of sabotage on such assessments, even though, in at least the latter instance, the issue was given detailed consideration in one of the two reports relied on by DOT. App., pp. 50a-52a.

The Court of Appeals, in holding that DOT did not act arbitrarily by failing to prepare an EIS, referred frequently to the deference owed by the Court to the judgment of DOT, citing particularly to the decision of this Court in Baltimore Gas & Electric Co. v. Natural Resources Defense Council, ___ U.S. ___, 103 S. Ct. 2246, 76 L. Ed. 2d 437 (1983). However, in that case the Nuclear Regulatory Commission "prepared three studies of the environmental effects of the fuel cycle" and issued a "Statement of Consideration ... show[ing] that it had digested this mass of material and disclosed all substantial risks...". 103 S. Ct. at 2253, and n. 11, 76 L. Ed. 2d at 447, n.11, and 448. Similarly, in the other recent case involving nuclear

power decided by this Court, Metropolitan Edison Co. v. People Against Nuclear Energy, ___ U.S. ___, 103 S. Ct. 1556, 75 L. Ed. 2d 534 (1983), NRC prepared an EIS to study the consequences of a nuclear accident. As this Court noted: "The NRC considered, in the original EIS and in the most recent EIA [Environmental Impact Assessment] for TMI-1 [Three Mile Island-Unit 1], the possible effects of a number of accidents that might occur at TMI-1." 103 S. Ct. at 1561, n.9, 75 L. Ed. 2d at 543, n. 9. Indeed, it is the policy of NRC that before licensing a new nuclear power plant it must prepare an EIS containing a worst-accident analysis. 10 CFR §51.5(a)(1); 45 Fed. Reg. 40101 (June 13, 1980.) Yet in the case at bar, DOT refused to prepare an EIS studying the potential consequences of its rule, even though its termed the danger of a high consequence accident to be "credible". Under the circumstances, such refusal must be termed arbitrary.

The holding of the Court of Appeals that DOT was not arbitrary in failing to prepare an EIS necessarily rested upon its other holdings that

neither HMTA nor NEPA requires that DOT consider alternative modes of transportation such as barging, an alternative raised by the City of New York. App., pp. 11a-13a. Those holdings are wrong.

The primary purpose of HMTA is to improve protection of the public from the risk of transporting hazardous materials. The Act, in 49 U.S.C. §1801, provides the following statement of policy:

> It is declared to be the policy of Congress in this chapter to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risk to life and property which are inherent in the transportation of hazardous materials in commerce. (Emphasis added.)

Consistent with that statement of policy, the legislative history of HMTA, detailed in the opinion of the District Court, confirms that the primary purpose of HMTA was to improve public safety.

App., pp. 174a-177a.* The substantive provisions of HMTA confirm this. See, e.g., 42 U.S.C. §1804 ("The Secretary [of Transportation] may issue ... regulations for the safe transportation in commerce of hazardous materials"). Furthermore, the legislative history of HMTA makes clear that the improvement of safety was to be accomplished through a comprehensive, coordinated and intermodal regulation of the transportation of radioactive material. App., p. 176a. Prior to the enactment of HMTA in 1975, responsibility for regulating the transportation of radioactive materials was scattered among a number of federal agencies, including the Federal Highway Administration, the Federal Railway Administration and the Federal Aviation Administration. App., pp. 14a, 174a-176a.

*It is noteworthy that Senate discussions of the conference committee report on the 1974 bill that became HMTA reflected the fears of various Senators concerning the possibly cataclysmic result of an accident involving the transportation of hazardous materials. See comments of Senators Hartke and Magnuson at 120 Cong. Rec. S. 40677 and 40679 (1974).

Under the circumstances, there is no adequate basis for the Court of Appeals' statement that "Congress ... expected that [DOT] would continue to follow the prior practice of regulating each mode of transportation on an individual basis". App., p. 15a. Even if this Court does not agree with the holding of the District Court that HMTA mandates that DOT adopt only safer options where practicable, (App., p. 173a), at the very least HMTA requires that DOT give significant consideration to tendered alternatives such as barging across local waters. This Court has recognized that State regulations designed to protect public health are entitled to special respect. See Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 443-4 (1978). Similarly, HMTA requires that tendered alternative modes of transporting radioactive materials (which, in the case of New York City, is the result of a local safety ordinance) receive significant consideration by DOT when it attempts to regulate any mode of transporting radioactive materials. Accordingly, DOT violated the substantive dictates of HMTA

when it restricted its consideration of alternatives to shipments by highway and refused to consider other, apparently safer modes of transport, like barging. 46 Fed. Reg. at 5300 (Jan. 19, 1981).

In failing to consider such alternatives, DOT also violated the procedural requirements of NEPA. Pursuant to NEPA, an EIS must include " a detailed statement by the responsible official on ... alternatives." 42 U.S.C. §4332(c); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978). Furthermore, as the Court of Appeals recognized (App., p. 18a), the agency's selection of alternatives is subject to judicial review, and the agency will not be allowed to artificially narrow the objective of its action. See, County of Suffolk v. Secretary of Labor, 562 F. 2d 1368, 1375 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978); Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 739-41 (D. Conn. 1972).

As an EIS should have been prepared, DOT's duty to consider alternatives was necessarily broadened and should be viewed in light of the

substantive requirements of HMTA. Barging is a reasonable alternative to shipping large quantity radioactive materials through crowded urban areas. As the District Court noted, reports relied upon by DOT indicate that barging may be cost-effective and at the same time minimize or entirely eliminate the risk of an accident. App., p. 155a. DOT, which is required by the CEQ regulations to "identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions" (40 CFR §1500.2[(e)], did not fulfill its NEPA mandate by making an initial determination that it would limit its inquiry to highway routing alternatives (App., p. 6a), or by dismissing non-highway alternatives with a conclusory and unsupported statement that "[o]ther modes of transport generally do not appear to offer alternatives which clearly lower public risks...". App., p. 79a; 46 Fed. Reg. at 5299 (Jan. 19, 1981). Here, in failing to consider non-highway alternatives, DOT failed to take the requisite "hard look" at the consequences of its action and HM-164

should have been annulled, at least as to the City of New York.

The Circuit Court, in finding that neither HMTA nor NEPA had been violated although the barging alternative had not been considered, stated that such alternative was a site-specific solution which could be considered on an application for a non-preemption ruling pursuant to 49 U.S.C. §1811(b). App., pp. 12a-13a, 21a-22a. However, the claim that barging is a site-specific solution is inconsistent with the proof before the Court of Appeals that 74% of the nation's nuclear facilities are directly accessible to navigable waters. App., p. 21a. Furthermore, in January, 1982, DOT responded to a request by the City for a non-preemption ruling, informing the City that the legislative history of HMTA showed that such a ruling would be granted only in "exceptional circumstances". App., pp. 83a-84a, 95a-96a. DOT indicated that the City's application in support of its barging alternative relied on the same studies considered by DOT in promulgating HM-164 and in

concluding that the risk of radioactive materials transport was too low to justify local bans of highway transport, and required the City to make a detailed analysis in support of its application that was of such proportions that the District Court described it as a "massive demonstration" App., pp. 84a-86a. Such an alternative could not satisfy the requirements of NEPA, since "the primary and nondelegable responsibility for providing ... an [environmental] analysis lies with the agency." County of Suffolk v. Secretary of Interior, supra, 562 F. 2d at 1385. As for DOT's substantive obligations under HMTA, it is submitted that the availability of such non-preemption procedure, available only in unique and "exceptional circumstances," does not mitigate DOT's duty to consider apparently safer modes of transporting radioactive material when promulgating a nationwide rule like HM-164.

CONCLUSION

For the reasons stated above, this Court should note probable jurisdiction of the appeal.

November 3, 1983.

Respectfully submitted,

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